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No. 03-5554

In The Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

vs.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA AND THE COUNTY OF HUMBOLDT AND THE HONORABLE RICHARD A. WAGNER, DISTRICT JUDGE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Nevada

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether requiring an individual, lawfully detained on reasonable suspicion, to identify himself constitutes an unreasonable search and seizure under the Fourth Amendment.

2. Whether requiring an individual, lawfully detained on reasonable suspicion, to identify himself is a violation of the privilege against self-incrimination under the Fifth Amendment.

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STATEMENT OF THE CASE

On May 21, 2000 Humboldt County Deputy Sheriff Lee Dove received a call from the Humboldt County Sheriff's Dispatch. Deputy Dove was informed that an individual called and stated he had observed a man hit a woman inside a red and silver GMC truck on Grass Valley Road in Humboldt County, Nevada. Deputy Dove drove his patrol vehicle south on Grass Valley Road and stopped his vehicle near the intersection of Thomas Canyon and Grass Valley Road. He had a brief conversation with the reporting person, Mr. Riddley. Mr. Riddley informed Deputy Dove that he was the person who made the call and pointed in a direction down the road where the vehicle was located. (App. 9).

Deputy Dove then drove further south on Grass Valley Road where he observed a red and silver GMC truck pulled off to the side of the road. He noticed skid marks in the gravel, leading Deputy Dove to believe that the truck had been pulled off the road in a fast and aggressive manner. When Deputy Dove got out of his vehicle he saw a male, Larry Dudley Hiibel, (hereinafter referred to as Hiibel) standing outside the truck. Due to Hiibel's mannerisms while standing outside the truck, Deputy Dove believed Hiibel was intoxicated. (App. 9-10, 16-17).

As Deputy Dove approached Hiibel he noticed a female inside the truck. Pursuant to Nevada Revised Statute (NRS) 171.123(3), which requires an individual to identify himself when detained on reasonable suspicion, Deputy Dove asked Hiibel to identify himself. Hiibel asked "why"? Deputy Dove explained that he needed his identification because of the reported fight. (App. 4). Hiibel refused and continued to act agitated and angry toward

Deputy Dove. Deputy Dove asked Hiibel to identify himself eleven different times. On each occasion Hiibel refused to comply with this request. During this encounter Hiibel placed his hands behind his back and challenged Deputy Dove to arrest him and take him to jail. (App. 4, 10, 17). Deputy Dove finally told Hiibel that if he did not identify himself he would be arrested. (App. 4). Hiibel again refused to identify himself and Deputy Dove placed him under arrest. (App. 4, 17).

Hiibel was charged with violating NRS 199.280, resisting an officer, on the basis of his failure to identify himself pursuant to NRS 171.123(3). On December 13, 2001 a criminal trial was held. At the conclusion of the trial the court found Hiibel guilty. (App. 3-5). Hiibel appealed the trial court's decision to the Sixth Judicial District Court of Humboldt County, Nevada. (App. 6). The District Court affirmed Hiibel's conviction. (App. 6-14). Hiibel filed a Writ of Certiorari to the Nevada Supreme Court. The court agreed to consider the merits of Hiibel's Petition for Writ of Certiorari.

On December 20, 2002 the Nevada Supreme Court issued a written opinion denying Hiibel's petition. In the opinion the court held that the Fourth Amendment only protects against unreasonable searches and seizures. The court balanced the public interest and the individual's right to personal security as it relates to the requirements of NRS 171.123(3). The court concluded that in light of the concerns for officer safety it is reasonable to require a person, who is detained on reasonable suspicion, to identify himself when requested by the officer. (App. 19). The court also stated that requiring a person to identify himself was a minimal intrusion and providing your name does not constitute providing incriminating information.

The court reasoned that NRS 171.123(3) is a commonsense requirement that protects both the public and officers. (App. 22-24). On April 25, 2003, Hiibel's petition for rehearing was also denied by the Nevada Supreme Court. (App. 36). On July 22, 2003, Hiibel filed his Petition for Writ of Certiorari with the United States Supreme Court. On October 20, 2003, this court granted Hiibel's Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

When determining if a particular search or seizure is a violation of the Fourth Amendment, a court must consider two competing interests: the public's interest and the individual's right to personal security free from arbitrary interference by law enforcement. The process in resolving this conflict requires a court to decide first whether the conduct is an unreasonable search or seizure under the common law. If this inquiry fails to resolve the issue, the court should then evaluate the conduct by applying traditional standards of reasonableness.

The common law and nightwalker statutes permitted peace officers to detain individuals and demand they give an account of themselves. It can be assumed that as part of this inquiry the detained individual would be required to identify himself. The Framers had knowledge of the common law and these statutes at the time the Fourth Amendment was drafted. In fact, many States had enacted similar statutes prior to and at the time the Fourth Amendment was drafted. Since it was acceptable under the common law for an officer to detain an individual and

ask him to account for his presence, the Framers would not find it unreasonable to detain a person on reasonable suspicion and require him to state his name.

Applying traditional standards of reasonableness to the facts in this case, it is clear that the government's interest outweighs Hiibel's right to personal security. Requiring a lawfully detained person to identify himself is a minimal intrusion. This act does not require an officer to physically touch the suspect, move him to a different location or extract bodily fluids. NRS 171.123(3) merely requires a person, lawfully detained on reasonable suspicion, to identify himself. This requirement can be met either by stating a name or producing an identification card. How the person chooses to identify himself is left to his or her discretion. Placing this discretion with the detained person reduces the intrusive nature of the request and removes any discretion by the officer to determine if the identification satisfies the statute. Of course, if the person provides a false name the officer may continue to detain the person until the conflict is resolved.

In addition, the Court, in dicta, has indicated that obtaining a suspect's fingerprints in the field may be reasonable and a permissible intrusion under the Fourth Amendment if supported by reasonable suspicion. If the Court is inclined to uphold compelled fingerprinting by field officers, it should not find requiring a lawfully detained suspect to identify himself to be unreasonable. Both acts reveal the identity of the detained person yet stating your name is far less intrusive.

Obtaining a suspect's name is also the essence of good police work. It allows the officer to find out what type of individual he is investigating and whether the suspect

presents a potential threat to the officer's safety. The officer will be able to determine if the suspect's name matches the name on any outstanding warrants or teletypes issued from either his own jurisdiction or another jurisdiction. If the suspect's name matches the information entered into the National Crime Information Center (NCIC) or National Law Enforcement Telecommunication System (NLETS), the officer will be in a position to either arrest the suspect or inform the issuing agency of the suspect's whereabouts. This furthers the substantial governmental interests of crime detection and crime prevention.

An individual certainly has the right to personal security free from arbitrary interference of law enforcement officers. However, when considering that requiring a person to identify himself is a minimal intrusion, promotes effective law enforcement and advances the safety of the officer, an individual's right to personal security diminishes. As a result, a person does not have a Fourth Amendment right to refuse to identify himself when detained on reasonable suspicion.

The Fifth Amendment protects an individual from being compelled to give testimonial communication. Stating your name is not testimonial. Compelling a person to state their name simply gives the government access to documents or information about the defendant. The government is still obligated to pursue its investigation in search of this information. Compelling a person, lawfully detained on reasonable suspicion, to identify himself does not require the person to speak to his guilt. Though the name may link the person to an outstanding warrant, it does not compel the person to inform the officer that he has an outstanding warrant in another jurisdiction. A

person's name is more like a fingerprint, voice exemplar or handwriting writing analysis. It is used by law enforcement to identify the person.

In addition, stating your name is not incriminating. The name being communicated already exists and is quasi-voluntarily created. This Court has ruled that if a document is voluntarily created prior to the request to produce, it is not protected by the Fifth Amendment even though the document may contain incriminating writing. Applying this rationale to a person's name, though the name itself may be incriminating, it is not protected by the Fifth Amendment because it is voluntarily created. Perhaps a better analogy would be if the person was required to produce a driver's license as opposed to stating his or her name. A driver's license is more akin to a document but compelling a person to produce a driver's license or national identification card is more intrusive than merely stating your name. As a result, this Court should only decide that a person, lawfully detained on reasonable suspicion, is required to identify himself and allow the person to choose how he or she will comply with this requirement.

Hiibel contends that the name will lead to incriminating evidence. However, stating your name is not the type of answer this Court was concerned with in *Hoffman v. United States*, 341 U.S. 479 (1951). It does not reveal a person's association with others or where he is employed. Clearly, the compelled answer, under the facts presented in this case, is not protected by the Fifth Amendment. In addition, there are numerous circumstances where providing your name may lead to incriminating circumstances but is not necessarily a violation of the Fifth Amendment. For instance, this Court stated that an arrestee can be

required to state his name, address, height, weight, eye color, date of birth and age during the booking process. Yet the booking officers are likely to run the arrestee's name through NCIC to determine if any outstanding warrants match the name. Though it may lead to incriminating evidence, this Court is unlikely to permit an arrestee to refuse to provide this information because it does not promote the policy enunciated in *Hoffman*.

The protections offered in *Miranda* also do not apply under these facts. The purpose of *Miranda* is to inform a person of his rights prior to custodial interrogation. Hiibel was never placed in custody prior to being asked to identify himself. Therefore, he cannot claim the protections of *Miranda*. Finally, when announcing its decisions regarding a person's obligation to answer questions during a *Terry* detention, this Court has stated that a person cannot be compelled to answer questions relating to unsolved crimes. Asking a person, lawfully detained on reasonable suspicion, to state his or her name is not asking about an unsolved crime. It communicates no information about a crime but only gives access to the information about the person. For these reasons, this Court should affirm the Nevada Supreme Court's decision and find that NRS 171.123(3) does not violate the Fourth and Fifth Amendments of the United States Constitution.

ARGUMENT

The Fourth Amendment claim presented in Petitioner's Writ of Certiorari asks whether a lawfully detained individual is required to identify himself to a law enforcement officer during the initial stages of a criminal

investigation pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). As in *Terry*, this Court is being asked in the case at bar to consider the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances. *Id.* at 4. However, unlike *Brown v. Texas*, 443 U.S. 47, 51-52 (1979), both parties agree that Deputy Dove had reasonable suspicion to detain Hiibel for the crimes of battery and driving while under the influence of alcohol.[1] As a result, the issues in this case arise from the conduct occurring after a lawful detention and must be evaluated in terms of Fourth Amendment reasonableness. When applying the standards articulated by this Court and considering the strong public policy supporting the reasonableness of the officer's conduct in this case, Hiibel simply cannot demonstrate that his rights under the Fourth Amendment have been violated.

I.

Requiring an Individual Lawfully Detained on Reasonable Suspicion to Identify Himself to an Officer Does Not Violate the Fourth Amendment.

The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,

[1] Hiibel conceded before the Nevada Supreme Court that Deputy Dove had reasonable suspicion to detain him.

> but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

This Court has applied a two part analysis when determining if a particular act by a law enforcement officer constitutes a violation of the Fourth Amendment. *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999). The first consideration is whether the conduct complained of was regarded as an unlawful search or seizure under the common law at the time the Fourth Amendment was framed. *Atwater v. City of Lago Vista*, 532 U.S. 318, 326-327 (2001); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). If that inquiry provides no suitable answers then the search or seizure must be evaluated under traditional standards of reasonableness. This involves weighing an individual's privacy interests against the legitimate interests of the government. *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-653 (1995). The analysis presented below demonstrates that requiring a lawfully detained person to identify himself is not unreasonable under the Fourth Amendment.

A. Requiring an individual lawfully detained on reasonable suspicion to identify himself would not be regarded as an unreasonable search or seizure under the common law at the time the Fourth Amendment was drafted.

The common law supports the proposition that, under certain circumstances, a person may be required to identify himself to an officer. In *Atwater v. City of Lago Vista*,

532 U.S. 318 (2001), this Court cited numerous English Statutes in support of its opinion that the common law allowed warrantless arrests for misdemeanor offenses. This Court recognized that the legal background of the Framers of the Fourth Amendment would have included knowledge of these English statutes and that this knowledge would have been incorporated into the Framers concept of reasonableness. *Id.* at 333. Included in these English statutes are the so called "nightwalker" statutes. These statutes authorized a peace officer and night watchmen to detain any suspicious person and inquire as to what they were doing. These statutes also authorized a peace officer to make inquiry of all persons being lodged in the suburbs or other places in town. *Id.* at 333-334. These nightwalker statutes did not just pertain to felons but applied to other individuals as well. *Id.* at 334 n.8.

In *Minnesota v. Dickerson*, 508 U.S. 366, 380-383 (1993), Justice Scalia stated in his concurring opinion that:

> "there is good evidence that the "stop" portion of the *Terry* "stop-and-frisk" holding accords with the common law – that it had long been considered reasonable to detain suspicious persons for the purpose of demanding that they give an account of themselves. This is suggested, in particular, by the so-called night-walker statutes, and their common-law antecedents. See Statute of Winchester, 13 Edw. I, Stat. 2, ch. 4 (1285); Statute of 5 Edw. III, ch. 14 (1331); 2. W. Hawkins, Pleas of the Crown, ch. 13 § 6, p. 129 (8th ed. 1824)"

Id. at 380.

These references to English statutes are in accord with William Blackstone's Commentaries on the Laws of England. Blackstone's commentaries state that the common law provided for various law enforcement offices including sheriff, justice of the peace and constable, whose primary responsibility was to keep the peace for the King. The sheriff was charged with apprehending individuals who break the peace and defend against the king's enemies. The justice of the peace was also responsible for apprehending criminals and two or more justices could hear and determine all felonies and other offenses. Constables were charged with keeping the peace and had power to arrest, imprison and break open houses. Their primary duty was to keep watch and apprehend all rogues, vagabonds and nightwalkers and make them give an account of themselves. 1 W. Blackstone, *Commentaries on the Laws of England* 328-345 (1769).

Since these nightwalker statutes and the common law allowed an officer to detain a person and compel him to give an account of himself, it is reasonable to assume this authority included requiring the detained person to identify himself. Based on this assumption and the fact that the Framers were familiar with these laws, requiring a lawfully detained person to identify himself would not be considered an unreasonable search or seizure under the common law.

B. Requiring an individual, lawfully detained on reasonable suspicion, to identify himself is permissible when considering traditional standards of reasonableness.

This Court has held that the touchstone of the Fourth Amendment is reasonableness and that reasonableness is

measured in objective terms based on the totality of the circumstances. *United States v. Knights*, 534 U.S. 112, 118-119 (2001); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). Further, when considering the reasonableness of the conduct this Court will balance the degree it intrudes on the individual's Fourth Amendment interests against its promotion of a legitimate governmental interest. *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-653 (1995). Applying these standards to the issues in this case, as set forth below, it is not unreasonable to require a person lawfully detained on reasonable suspicion to identify himself.

1. The law constitutes a minimal intrusion.

When determining the reasonableness of the governmental conduct this Court has consistently considered the extent of the intrusion into the detained person's life. In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court found that "even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.* at 24-25. Though this intrusion was deemed annoying, frightening and humiliating, the Court determined that the intrusion was permissible. The Court found that its justification, officer safety, was more important than protecting the detained person's right of personal security. *Id.* at 27, 29.

This Court has adopted the same rationale in other contexts such as traffic stops. In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) and *Maryland v. Wilson*, 519 U.S. 408 (1997), this Court found that requiring a driver or a passenger to get out of the vehicle during the course of the

traffic stop was a minimal intrusion and did not outweigh the important interests of an officer's safety. 434 U.S. at 110-111; 519 U.S. at 413-15. In addition, this Court has also upheld mandatory employee and student-athlete drug testing. *See Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989); *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). In each of these instances the governmental conduct is much more intrusive than requiring a lawfully detained person to identify himself.

The Court in *Terry* also stated that "the manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." 392 U.S. at 28. The plain meaning of NRS 171.123 reveals that the manner in which a suspect's name is obtained simply contemplates that the person identify himself to the officer. This identification requirement can be accomplished verbally or by showing an identification card. The detained person has the discretion to decide what method he will use to comply with this statutory requirement, and the statute does not give the officer the authority to reject either method. As long as the person identifies himself, how he accomplishes that requirement is not important. Furthermore, he cannot be arrested for resisting an officer if he chooses to verbally identify himself as opposed to presenting an identification card.

Hiibel contends that other methods for obtaining a person's name can be used to obtain a person's identification such as fingerprinting. This argument lacks merit. As previously stated, this Court will consider the intrusiveness of the governmental conduct when balancing the competing interests of the government and the individual. Comparing the requirement of stating your name to

compelled fingerprinting, it is clear that the latter is much more intrusive. The act of fingerprinting requires the officer to physically touch the detained person and move him to a different location so the act may be accomplished. The act of stating your name involves no physical contact, no movement of the suspect and is far less intrusive.

This Court addressed the issue of fingerprinting in *Davis v. Mississippi*, 394 U.S. 721 (1969). In *Davis* the Court ruled that it was a violation of the Fourth Amendment to transport a person to police headquarters and briefly question and fingerprint him for investigative purposes without probable cause, warrant or consent to justify the intrusion. 394 U.S. at 726-727. However, the *Davis* Court noted that fingerprinting constituted a less serious intrusion upon the personal security than other types of police searches, and detentions and that "fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. . . ." *Id.* In *Haynes v. Florida*, 470 U.S. 811 (1985), the Court revisited the permissible limits of fingerprinting a suspect based on reasonable suspicion. The Court reversed petitioner's conviction under the *Davis* rationale but in dicta stated that a brief detention in the field based on reasonable suspicion for the purpose of fingerprinting may be permissible under the Fourth Amendment. 470 U.S. at 816-817.

If a lawfully detained person may be compelled to provide fingerprints in the field, the same justification holds true for compelling a person to identify himself. Both are means of identifying the person and do not involve probing into the suspect's private life and thoughts. By comparison, compelling a suspect to be fingerprinted in

the field is more physically intrusive than simply compelling him to state his name. However, both requirements are reasonable in light of the strong governmental interest in detecting and preventing crime. As a result, this Court should find that when balancing the government's interests against a person's right of personal security interest, requiring a lawfully detained person to identify himself to an officer is reasonable and not a violation of the Fourth Amendment. *See Maryland v. Wilson*, 519 U.S. 408, 411 (1997).

Also, the intrusion complained of in this case occurred in a public place. This Court has previously discussed the significance of whether the intrusive conduct occurred in a public or private place. *See New Jersey v. T.L.O*, 469 U.S. 325, 337 (1985); *United States v. Mendenhall*, 446 U.S. 544, 555 (1980). This factor gives context to the intrusion and either mitigates or aggravates the intrusive nature of the governmental conduct. The encounter between Deputy Dove and Hiibel occurred alongside a public road. This allowed Deputy Dove's conduct to be subject to scrutiny by passersby traveling on the same road and reduced the potential of "heavy handed" or abusive tactics directed toward Hiibel. *See Berkemer v. McCarty*, 468 U.S. 420, 438-439 (1984). This factor further adds to the reasonableness of requiring Hiibel to identify himself.

It is evident that the requirements of NRS 171.123(3) constitute a minimal intrusion. The conduct does not require the detained person to be pat-frisked, moved, or to expel bodily fluids. The detained person retains the discretion to decide how to comply with the statute and provides no authority to the officer to determine if the method used is appropriate. In light of the minimal intrusion involved in this governmental conduct, this

Court should find that the requirements of NRS 171.123 (3) are reasonable and do not violate the Fourth Amendment.

2. The law allows an officer to engage in the essence of good police work.

In *Adams v. Williams*, 407 U.S. 143 (1972), this Court discussed the function of an officer during a *Terry* investigation. In *Adams*, an officer received information from a known informant that Williams was seated in a nearby car. The informant told the officer Williams was carrying drugs inside the car and had a gun tucked in his waistband. The officer approached the car and asked Williams to roll down his window. As he did so, the officer reached into the car and removed the gun from William's person. This Court reaffirmed the principles enunciated in *Terry v. Ohio*, 392 U.S. 1 (1968) but also provided some reasons for an intermediate response. In doing so, this Court stated: "on the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity, or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.* at 145-146 (citations omitted).

It appears the Court in *Adams* believed that determining the identity of the person being detained is part of the "essence of good police work" and one of the justifications for a *Terry* detention. Therefore, it is only reasonable to conclude that a lawfully detained person ought to be compelled to provide identification. Finding otherwise

would undermine an essential purpose of this intermediate response. It would be inconsistent for this Court to state that it is permissible for an officer to determine a suspect's identity but allow the suspect to refuse to give his name. By giving the suspect this right the officer's efforts in trying to identify the suspect would be useless and place him in the difficult position of trying to engage in good police work but not having the authority to do so. *See State v. Flynn*, 92 Wis.2d 427, 439-449, 285 N.W.2d 710, 715-720 (1979). The State does not believe this was the intent of the Court when it rendered its decision in *Terry*. Therefore, this Court should allow an officer to engage in the "essence of good police work" and require a lawfully detained individual to identify himself when requested by the officer.

3. The law gives added protection to an officer.

Officer safety is an important concern during any investigative encounter and must be considered when determining if an officer has a reasonable interest in obtaining a lawfully detained suspect's identification. Officers routinely detain individuals based on reasonable suspicion that the person may have committed a crime. These encounters present difficult circumstances filled with the possibility of harm to the officer, particularly when the officer is investigating a crime relating to violence. If the officer can acquire the suspect's name at the beginning of the lawful detention, the officer can request the suspect's criminal history and ask if there are any outstanding warrants. Upon receiving this information, the officer will be in a better position to know who he is confronting and can take necessary precautions to ensure

his safety. Though every lawfully detained suspect could potentially harm the officer, having this information can alert the officer as to the likelihood of such harm. As a result, this information will play an important role in how officers conduct themselves during these encounters and assist them in evaluating the potential threat to their safety.

This concept and concern is not new to this Court's Fourth Amendment jurisprudence. In fact, this Court has previously discussed officer safety under a variety of circumstances and concluded that a minimal intrusion into a person's life was justified given the concern for the officer's safety. In *Terry*, the Court carved out an exception to the probable cause requirement for searches and seizures under the Fourth Amendment. In *Terry*, Officer McFadden observed three suspects engage in suspicious conduct. After observing this conduct he approached the suspects and asked them for their names. In response, the suspects mumbled something that was not clear to McFadden. Since McFadden did not receive a clear response to his request for identification he grabbed Terry, spun him around and patted down his outer clothing. In the left breast pocket of Terry's overcoat McFadden felt a weapon. He reached inside the coat but could not remove the gun. Subsequently, McFadden ordered Terry and the other suspects inside a store. He removed Terry's overcoat and retrieved the gun. *Id.* at 5-7.

This Court upheld officer McFadden's conduct and found that it did not violate the protections of the Fourth Amendment against unreasonable searches and seizures. In considering these facts, the majority noted that an apprehension of danger may arise long before the officer has sufficient information to arrest the suspect. As a

result, when balancing the officer's safety against the intrusion of frisking a person, the officer's interest in taking steps to assure himself that the suspect is not armed with a weapon that could be used against him was more important. *Id.* at 23, 27. Indeed, the sole justification of the search was to protect the officer. *Id.* at 29.

In the instant case, one of the reasons for asking the suspect to identify himself is to protect the officer. *See Adams v. Williams*, 407 U.S. 143, 146 (1972) (the purpose of the limited search was not to discover evidence of crime but to allow the officer to pursue his investigation without fear of violence). When an officer initially asks a person to identify himself, he wants to pursue the investigation with a better understanding of the type of person he is confronting. This information will help to alleviate any fear of not knowing if the person is or is not a potential threat to his safety. Any information that is derived after a suspect provides his name becomes part of the officer's assessment in determining if the suspect may be armed and presents a threat to his safety.

In *Maryland v. Wilson*, 519 U.S. 408 (1997), the Court discussed officer safety as a legitimate, reasonable basis to justify intruding into the personal security of a lawfully detained individual. This Court was asked to decide if a passenger could be ordered out of a lawfully stopped vehicle. In considering this question, the majority and Justice Stevens in dissent, agreed that there is a "strong public interest in minimizing the number of assaults on law officers." *Id.* at 413 n.2. The Court held that when considering the potential danger a passenger presents to an officer, authorizing an officer to order the passenger out of the car was a minimal intrusion on that person's personal security. *Id.* at 413-415.

As previously argued, a "strong public interest" exists in this case. It is important that an officer be given the ability to create a safer environment when confronting an individual who may have committed a crime. Just like allowing an officer to frisk a person for weapons or remove a passenger from a car in order to deny him access to a weapon, obtaining information about the individual's criminal history creates a safer environment. It creates a safer environment because the officer will be given information about the person's past and whether they have a history of violence. A person with a history of violence certainly poses a much greater threat to the officer's safety. Having this information would assist the officer to better evaluate the circumstances confronting him. If the officer knows the person has a history of violence he can call for back up or draw his duty weapon. If the person has no history of violence the office may take a less aggressive posture. Whatever decision is made by the officer will be based on less guess work and more information. This can only lead to a safer environment for both officer and suspect. Therefore, compelling a person to provide their name is certainly a reasonable method of protecting an officer and other individuals. *See Allen v. City of Los Angeles*, 66 F.3d 1052, 1056, 1057 (9th Cir. 1995) (police officers are entitled to employ reasonable methods to protect themselves and others in potentially dangerous situations).

4. The law promotes the government's interest in crime prevention and crime detection.

Requiring a lawfully detained individual to identify himself is part of the overall legitimate interest of law

enforcement in promoting crime prevention and crime detection. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968). Often, officers are given information about a crime that has occurred or is about to occur, including the suspect's name. When an officer detains a person on reasonable suspicion he should be allowed to use that information. If a suspect is allowed to withhold his name, the legitimate purposes of crime prevention and detection are frustrated. The protections of the Fourth Amendment do not go this far. In addition, the officer should be allowed to find out whether there are any outstanding warrants or bulletins on the detained person. This can be accomplished by submitting the detained suspect's name through the Federal Bureau of Investigation's National Crime Information Center (NCIC). The National Crime Information Center was established in 1965 and was created because of a continuing rise in the national crime rate. NCIC is governed by 28 U.S.C. § 534 and 18 U.S.C. § 924(e). This computerized system started out with fifteen (15) on-line state and city area terminals connecting into the FBI's central computer.

By 1971 all fifty (50) states and the District of Columbia were hooked up to NCIC. *National Crime Information Center: 30 years on the Beat*, The Investigator (December 1996 – January 1997 issue) http://permanent.access.gpo.gov/lps3213.ncici November 21, 2003). This information system includes, but is not limited to: the person's name, date of birth, social security number, FBI number, criminal arrests and charges as well as a physical description. NCIC Code Manual Personal Descriptors p. 1-39 (2000) *available at* www.leds.state.or.us/resources/ncic_2000/ncic_2000code_manual.htm-6k. NCIC also provides information regarding persons with outstanding warrants, missing persons, a "Temporary Felony Want," adjudicated

juveniles who have absconded, individuals designated by the U.S. Secret Service as posing a potential danger to the President of the United States and members of violent gangs. *See* National Crime Information Center (NCIC) FBI Information Systems, *available at* http://www.fas.org/irp.agency/doj/fbi/is/ncic.htm.

The creation of the National Crime Information Center system has formed a cooperating network among all federal, state, metropolitan, and rural law enforcement agencies throughout the United States. Access to the system can only be accomplished by authorized law enforcement personnel. It is a tremendous asset to the officer in the field when confronting a detained person and locating wanted fugitives. The NCIC system is an essential law enforcement tool that is used in detecting and preventing crime.

Another system associated with NCIC is the National Law Enforcement Telecommunication System or NLETS. This system allows law enforcement agencies to broadcast an All Points Bulletin (APB) listing the name and other identifiers of a person suspected of committing a crime. If the suspect is detained, the issuing jurisdiction will be notified of the suspect's location. If an officer had reasonable suspicion to detain this particular individual but could not obtain the person's name, the suspect's status would go undetected. This would delay the issuing jurisdiction's investigation and ability to determine who may have committed the alleged crime.

These references illustrate why the purpose of a *Terry* detention should encompass more than just the detection and prevention of the underlying crime. If the goal of a *Terry* detention is to detect and prevent crime, it must

include the ability to assist other law enforcement agencies in detecting and preventing crime arising out of their respective jurisdictions. This Court's decision in *United States v. Hensley*, 469 U.S. 221 (1985), lends additional support to this argument. In *Hensley*, officers received a flyer from another law enforcement agency indicating that Hensley may have been involved in an aggravated robbery. The flyer instructed officers to pick up Hensley if located and hold him for investigation purposes. Officers from the City of Covington, Ohio, encountered Hensley but allowed him to leave. After Hensley left, one of the officers thought he remembered some information on a flyer regarding Hensley's involvement in a past crime.

While the information was being confirmed an officer located Hensley's car. As he drove up to the car he recognized the passenger and knew he was a convicted felon. When the officer walked up to the open passenger door he saw a handgun underneath the passenger's seat. The officer arrested the passenger and subsequently searched the car. Two additional handguns were found and Hensley was arrested. 489 U.S. at 224-225. Hensley was convicted in federal court but the Sixth Circuit Court of Appeals reversed his conviction. In reversing the Sixth Circuit's decision this Court stated, "Despite these differences, where police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong governmental interest in solving crimes and bringing offenders to justice. . . ." 489 U.S. at 229. Pursuant to *Hensley*, it is clear this Court recognizes that obtaining identification during a lawful investigative detention is an important

part of police work and promotes the strong governmental interest in detecting and preventing crime.

C. *Lawson v. Kolender* and its progeny are inapposite to the Fourth Amendment issues presented in this case.

Several federal circuit courts, including the Ninth Circuit Court of Appeals, have addressed the identification issue presented in this case and are referred to by Hiibel in support of his argument. These cases have arisen in the context of a civil lawsuit pursuant to 42 U.S.C. § 1983. However, when deciding this issue these courts have reached conflicting conclusions. In *Lawson v. Kolender*, 658 F.2d 1362 (9th Cir. 1981), the Ninth Circuit was asked to determine the constitutionality of a California vagrancy law and whether the requirement to provide identification upon request of an officer violated the Fourth Amendment. The court considered the interests of law enforcement but ultimately determined that an individual's right to personal security outweighed the interests of law enforcement. The court concluded that the vagrancy law allowed an officer to arrest a person on less than probable cause. As a result, the court ruled that requiring a person to identify himself was an unreasonable search and seizure under the Fourth Amendment.

The case at bar presents a different legal issue than that presented in *Lawson*. The statute in *Lawson* gave unfettered discretion to an officer to detain a person simply because he was wandering from "place to place without apparent reason." 658 F.2d at 1363; *Kolender v. Lawson*, 461 U.S. 352, 360-361 (1983). This statute criminalized an individual's right to freely move about. The

statute essentially took the concept of consensual encounters and gave officers authority to detain on less than reasonable suspicion and arrest on less than probable cause. The person was not free to ignore the questions and continue walking. *See United States v. Mendenhall*, 446 U.S. 544, 553-554 (1980). Instead, the person was required to provide identification upon request by the officer or be arrested.

In this context, the Ninth Circuit correctly concluded that since the underlying basis for stopping the person could not be a crime, the officer did not possess reasonable suspicion. Therefore, requiring the person to provide identification was illegal and violated the Fourth Amendment. However, in the instant case, Hiibel was being detained because there was reasonable suspicion that he had committed the crime of battery and driving while under the influence of alcohol, not because he was in a particular area. Lawson's conduct was protected by the United States Constitution. *See City of Chicago v. Morales*, 527 U.S. 41, 53-54 (1999). Hiibel's conduct is not. Therefore, the legal rationale of *Lawson* cannot be applied to the facts in this case because the underlying premise is different.

The same holds true in *Martinelli v. City of Beaumont*, 820 F.2d 1491 (9th Cir. 1987) and *Carey v. Nevada Gaming Control Board*, 279 F.3d 873 (9th Cir. 2002), *cert. denied*, 537 U.S. 805 (2002). In both of these cases, the Ninth Circuit Court of Appeals relied upon *Lawson v. Kolender*, 658 F.2d 1392 (9th Cir. 1981) and determined that under the Fourth Amendment an individual could not be compelled to identify himself. However, the court's reasoning in these opinions lacks merit. The court failed to recognize that the reason the California vagrancy statute in *Lawson*

violated the Fourth Amendment was because it allowed officers to detain a person for engaging in constitutionally permissible conduct. In *Martinelli* and *Carey* the suspects' detention was based on a constitutionally valid criminal statute and therefore the officers had reasonable suspicion to detain them. Therefore, the rationale used in *Lawson* would not apply.

In light of these two decisions, it appears the Ninth Circuit Court of Appeals has moved to a general conclusion that a lawfully detained person can never be compelled to provide identification. This Court should disregard the Ninth Circuit's decisions in *Martinelli* and *Carey* and place greater weight on the Tenth Circuit Court of Appeals' opinion in *Oliver v. Woods*, 209 F.3d 1179 (10th Cir. 2000). In *Oliver*, the Tenth Circuit held that the officers' initial reasonable suspicion ripened into probable cause that Oliver had violated several Utah laws when he refused to identify himself. The Tenth Circuit Court of Appeals ruled that Officer Woods had lawfully detained Oliver on reasonable suspicion that Oliver may have committed a crime. *Id.* at 1188. The court cited *Adams v. Williams*, 407 U.S. 143 (1972) and stated "when an officer is conducting a lawful investigative detention based on reasonable suspicion of criminal activity, the officer may ask for identification and an explanation of the suspect's presence in the area." *Id.* at 1189. The court further reasoned that since the detention was lawful the request to provide identification was a lawful order. Therefore, Oliver's refusal was a violation of a criminal statute that required him to comply with a lawful order, i.e. to provide identification. As a result, Officer Woods could have reasonably believed he had probable cause to arrest Oliver and therefore did not

violate his Fourth Amendment rights by placing him under arrest. 209 F.3d at 1188-1189.

In *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) this Court stated:

> But we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simply to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.

Id. at 347 (citations omitted).

The Tenth Circuit Court of Appeals' reasoning is persuasive and furthers the policies mentioned in *Atwater*. The Nevada Supreme Court also agreed that the reasoning in *Oliver* was a correct application of the Fourth Amendment to the identification issue presented in this case. The rationale of the Nevada Supreme Court promotes effective law enforcement based on a common sense approach to the daily encounters experienced by an officer in the field. Without a proper investigation those who are innocent might be falsely accused. Those who were guilty

might wholly escape prosecution and many crimes would go unsolved. As a result, the security of all would be diminished. *Haynes v. Washington*, 373 U.S. 503 (1963). The State asks this Court to consider the reasoning of *Oliver* and find that a lawfully detained person does not have a Fourth Amendment right to refuse to identify himself when an officer is engaged in a lawful duty.

D. This Court's opinions regarding consensual encounters do not apply to NRS 171.123(3).

The amicus brief submitted by the American Civil Liberties Union (ACLU) supports its argument by referring to cases involving consensual encounters. (Brief p. 4-12). Citing *Florida v. Royer*, 460 U.S. 491 (1983), the ACLU states there are three narrowly confined areas to a *Terry* "stop and frisk." (ACLU Amicus Brief p. 7). Referring to the third area, amicus writes "most significantly for purposes of this case, the police officer may question the individual detained, but the individual need not answer any questions put to him, indeed he may decline to listen to the questions at all and may go on his way." (ACLU Amicus Brief p. 7-8). *Royer* is inapplicable to this case. It is clear the *Royer* court is considering the context of a consensual encounter, not an investigative or *Terry* stop.

In the context of a consensual encounter a "person need not answer any question put to him." 460 U.S. at 498. However, Hiibel cannot claim that right in this case because his encounter was an investigative detention not a consensual encounter. The State agrees that when an officer approaches an individual without reasonable suspicion that person has the right to ignore the officer's request to speak and go about his business. 460 U.S. at

497-498. Under those circumstances, the person's right to personal security outweighs the government's interest to detect and prevent crime because the consensual encounter relies primarily on the officer's unfettered discretion. Also, there is no standard for the officer to determine if the person is engaged in criminal activity. Therefore, it is only reasonable under the Fourth Amendment to allow a citizen to refuse to cooperate and continue on his or her way. Such a stop is not based on objective criteria and "the risk of arbitrary and abusive police practices exceeds tolerable limits." *See Brown v. Texas*, 443 U.S. 47, 52 (1979). However, unlike the officers in *Brown* and *Royer*, Deputy Dove had reasonable suspicion to detain Hiibel for the crimes of battery and driving while under the influence of alcohol. As a result, the State's interest increases because Deputy Dove had objective criteria to detain Hiibel and could focus on a particular crime or crimes.

The State is not advocating, as Hiibel and amici imply, that an officer should be allowed to arbitrarily detain any or all persons on the street and compel them to identify themselves. Rather, the State is asking this Court to narrowly apply the requirements of NRS 171.123(3) to only those circumstances where an officer has reasonable suspicion that the detained person may be committing a crime as permitted by *Terry v. Ohio*, 392 U.S. 1 (1968).

II.

Requiring an Individual, Lawfully Detained on Reasonable Suspicion, to Identify Himself Does Not Violate the Fifth Amendment Privilege Against Self-Incrimination.

The Fifth Amendment to the United States Constitution states "No person. . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const. amend. V. The word "witness" in the constitutional text only applies to the category of compelling incriminating communications to those that are "testimonial" in nature. *See United States v. Hubbell*, 530 U.S. 27, 34-35 n.8 (2000). The history and policies underlying the self-incrimination clause support the proposition that this privilege may only be asserted to resist compelled explicit or implicit disclosures of incriminating information. This privilege was created to prevent the type of inquisitorial methods used by ecclesiastical courts and the Star Chamber wherein an individual would be compelled under oath to answer questions designed to uncover uncharged offenses without evidence from another source. *See Andresen v. Maryland*, 427 U.S. 463, 470-471 (1976); *Doe v. United States*, 487 U.S. 201, 212 (1988). Against this historical backdrop, compelling a lawfully detained individual to identify himself to an officer does not constitute a violation of the Fifth Amendment.

A. Stating your name to an officer during a *Terry* detention is not a testimonial communication.

It is clear in this case that the information law enforcement seeks is compelled. However, it is not evident that the compelled communication is testimonial. In *Doe v.*

United States, 487 U.S. 201 (1988), this Court was asked to decide if a person's signature on consent form authorizing disclosure of foreign bank records was compelled testimony in violation of the Fifth Amendment. In defining the term "testimonial" this Court stated, "to be testimonial the accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Id.* at 210. Applying this definition to the facts of the case, this Court determined that the signed consent form was not testimonial. In reaching this conclusion the Court found that the consent form did not make reference to a specific account and did not acknowledge that an account in a foreign bank existed or was controlled by the petitioner. In addition, the signed consent form did not indicate whether documents or information relating to the petitioner were located at the bank. *Id.* at 214-215. This Court noted that "by signing the form, Doe makes no statement, explicit or implicit, regarding the existence of a foreign bank account or his control over any such account. Nor would his execution of the form admit authenticity of any bank records produced by the bank." *Id.* at 215-216 (citations omitted).

Asking a person, lawfully detained on reasonable suspicion, to state his or her name does not convey information about a crime that will assist the prosecution in uncovering evidence. The name does provide access to information contained in NCIC and public court documents. By analogy, the person is being asked to verbally consent to allow the government to obtain information as part of its investigation instead of signing a written consent form. However, the person is not being asked to confirm, either explicitly or implicitly, prior convictions,

whether he has any outstanding arrest warrants or any involvement in a particular crime. He is only being asked to surrender a key to a strongbox, not produce the effects inside it. 487 U.S. at 210 n.9. As in *Doe*, the prosecution must still locate this information and confirm its validity.

A better analogy to *Doe* may be if the detained person is required to produce an identification card. However, the State is not advocating a national identification card or that a person, lawfully detained on reasonable suspicion, must produce a driver's license. This requirement reduces the person's discretion as to how he or she chooses to comply with NRS 171.123(3). Also, it is more intrusive than merely requiring a person to state their name to an officer. Allowing the person to choose how to comply with this requirement maintains a correct balance between the Fourth and Fifth Amendments.

A person's name is similar to a physical characteristic. It identifies the person like a fingerprint, handwriting exemplar or voice analysis. In regard to these latter examples, this Court has repeatedly held that they fall out of the testimonial purview and therefore are not subject to Fifth Amendment protections. *See Gilbert v. California*, 388 U.S. 263, 266-267 (1967); *United States v. Dionisio*, 410 U.S. 1, 7 (1973). Stating your name is no more testimonial than providing a voice exemplar or handwriting analysis. In *United States v. Wade*, 388 U.S. 218 (1967), Wade was indicted for robbery. Without notice to his attorney, Wade was placed in a lineup and made to wear strips of tape on his face as the robber allegedly had done. Further, he was required to repeat the words used by the robber. Wade was subsequently convicted of robbery but his conviction was reversed by the Fifth Circuit Court of Appeals. This Court granted certiorari and determined

that Wade's Fifth Amendment privilege against self-incrimination was not violated when he was required to speak the same words the robber spoke during the robbery. This Court stated that these spoken words did not have any "testimonial significance" because he was not being asked to disclose any knowledge he had about the robbery itself. 388 U.S. at 222-223.

The same holds true when a person is compelled to state their name. The name itself does not disclose any knowledge of a crime. Providing a name does not require the person to "speak to his guilt." In the instant case, Hiibel's name would not have revealed that he unlawfully struck the woman seated in the car or any other essential element of the crime of battery or domestic battery. His name would not reveal where the battery occurred or even how it occurred. In those instances where compelling a suspect to reveal his name to the officer may result in the suspect's arrest for an outstanding arrest warrant, the right against self-incrimination is still not violated. Though the name may inform the officer that the suspect is wanted for a crime within the jurisdiction or another state, it does not give the officer evidence relating to the essential elements of the alleged crime, does not reveal information that corroborates the essential elements of the alleged crime, nor is it an admission against interest. A person's name carries with it no "testimonial significance" because it does not relate to a factual assertion or disclose information protected by the Fifth Amendment.

In *Pennsylvania v. Muniz*, 496 U.S. 582, 593 (1990) this Court found that the privilege against self-incrimination reflects our unwillingness to subject individuals to the trilemma of self-accusation, perjury or contempt. *Id.* at 595-596. In this regard the Court stated:

> We need not explore the outer boundaries of what is 'testimonial' today, for our decision flows from the concept's core meaning. Because the privilege was designed primarily to prevent 'a recurrence of the Inquisition and the Star Chamber . . . the definition of 'testimonial' evidence articulated in Doe must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the 'cruel trilemma.'

Id. at 596 (citations omitted).

In the case at bar, requiring Hiibel to state his name did not place him in "the cruel trilemma." Hiibel's name was never used against him at trial nor was he placed under oath. *See Chavez v. Martinez*, 123 S. Ct. 1994, 2001 (2003). As a result, Hiibel's privilege against self-incrimination was not violated. However, Hiibel was not totally unprotected. As this Court found in *Doe v. United States*, 487 U.S. 201 (1988), "indeed there are other protections against the governmental efforts to compel an unwilling suspect to cooperate in an investigation, including efforts to obtain information from him. We are confident that these provisions, together with the Self-Incrimination Clause, will continue to prevent abusive investigative techniques." *Id.* at 214. These protections include, the Fourth Amendment, attorney-client privilege, and the Due Process Clause. *Id.* at 214 n.13.

When considering whether compelling an individual, lawfully detained on reasonable suspicion, to state his name violates the Fifth Amendment, this Court should consider the *Doe* Court's sentiments when it stated:

> If the societal interests in privacy, fairness, and restraint of governmental power are not unconstitutionally offended by compelling the accused to have his body serve as evidence that leads to the development of highly incriminating testimony, as *Schmerber* and its progeny make clear, it is difficult to understand how compelling a suspect to make a nonfactual statement that facilitates the production of evidence.

Id. at 213 n.11. Applying these principles, this Court should find that requiring a person detained on reasonable suspicion to state his name does not offend the Fifth Amendment.

B. Stating your name to an officer during a *Terry* Detention is not an incriminating communication.

Historically, the Fifth Amendment privilege against self-incrimination was meant to protect a person from being compelled to state facts that would incriminate him and "answer questions designed to uncover uncharged offenses without evidence from another source." *See Andresen v. Maryland*, 427 U.S. 463, 470-471 (1976). This statement represents an abiding principle in Fifth Amendment jurisprudence but has no application to this case. This Court held in *United States v. Hubbell*, 530 U.S. 27 (2000), that voluntarily created documents were not compelled testimony even though the documents may be incriminating. *Id.* at 35-36. A person's name is a fact that already exists at the time of the stop and is quasi-voluntarily created. Therefore, applying this Court's rationale in *Hubbell*, a person's name should not be considered compelled. Though the name may be incriminating it is not protected

under the Fifth Amendment. In addition, prior to a *Terry* detention the officer has already obtained evidence of a crime from a different source. Therefore, the intent in asking the detained suspect his name is not to get the person to reveal incriminating information about an uncharged offense it is to identify. The suspect is not being asked to reveal where he was at a particular time, if he owns a particular weapon or to explain any evidence obtained by law enforcement. Clearly, asking a person, lawfully detained on reasonable suspicion, to state his or her name is not incriminating.

Hiibel asserts that compelling a person to state his or her name may lead to incriminating evidence. In *Hoffman v. United States*, 341 U.S. 479, 486-487 (1951), the Court announced that the Fifth Amendment extends to answers to questions that would furnish a link in the chain of evidence needed to prosecute the person. This statement was reaffirmed in *United States v. Hubbell*, 530 U.S. 27, 38 (2000). The ruling in *Hoffman* does not apply to this case. Hoffman was asked numerous questions that were more substantive than asking "what is your name?" The questions focused on Hoffman's employment and his relationship to a particular individual. These questions were designed to obtain incriminating information as opposed to finding out his name. In light of *Hoffman*, requiring a person to state his or her name does not compel the type of answer this Court intended to prohibit. Therefore, compelling a person to answer the question "what is your name" does not violate the Fifth Amendment.

In addition, where a person is being asked to provide information, any answer may lead to "other incriminating evidence." For instance, in *Pennsylvania v. Muniz*, 496 U.S. 582, 593 (1990), this Court held that questions

relating to the arrested person's name, address, height, weight, eye color, date of birth and current age could be asked. The Court deemed these to be administrative type questions and not necessarily questions asked to elicit incriminating evidence. *Id.* at 601-602 n.14. Nevertheless, when the arrestee provides his name during the booking process officers will more than likely run a check through NCIC to determine if the name matches the name on any outstanding warrants.

The State does not believe this Court is prepared to hold that an arrestee may refuse to provide his name during the booking process because it may lead to incriminating evidence. Yet the analogy is the same in regard to requiring a lawfully detained person to identify himself to an officer out in the field. As previously argued, one of the purposes of obtaining the suspect's name is to determine whether there are any outstanding warrants or bulletins matching the suspect's name. Though the name may match the information contained in NCIC, this does not necessarily lead to incriminating evidence because the name does not speak to the person's guilt. The prosecution is still obligated to prove that the suspect with this particular name committed the alleged crime. Unlike the answer to the question relating to the suspect's sixth birthday in *Muniz*, a prosecutor can derive no inference from the question "what is your name" as a means to support an element of the crime. To consider the Fifth Amendment privilege against self-incrimination as applying to compelled identification would be engaging in what Justice Holmes has called "an extravagant extension of the Fifth Amendment." *See Holt v. United States*, 218 U.S. 245, 252-253 (1910).

In *Byers v. California*, 402 U.S. 424 (1971), this Court recognized that when there is a question of a compelled

disclosure that has an incriminating potential the judicial scrutiny is invariably a close one. *Id.* at 427. This Court also noted that in an organized society many burdens are placed upon its citizens to provide information that may result in some future prosecution and that the "mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure. . . ." *Id.* at 427-428. Furthermore, providing identification is "essentially a neutral act." *Id.* at 432.

As in *Byers*, requiring a lawfully detained person to identify himself may result in a future prosecution. However, this has the same effect as being compelled to leave your name and address at the scene of a vehicle accident. "It identifies but does not by itself implicate anyone in criminal conduct." 402 U.S. at 433-434. Stating your name to an officer is essentially a neutral act. Though it may ultimately lead to an arrest and conviction, these events rely on other factors and independent evidence. *Byers*, 402 U.S. at 434. Therefore, requiring a lawfully detained person to identify himself cannot be deemed to be a violation of the privilege against self-incrimination.

C. *Miranda* does not apply in this context.

Another concern that may apply to the peripheral issues surrounding the Fifth Amendment privilege against self-incrimination, is to what extent *Miranda v. Arizona*, 384 U.S. 436 (1966), may play a role in this investigative encounter. Generally speaking, a *Miranda* warning is not required during a *Terry* investigation. *See Berkemer v. McCarty*, 468 U.S. 420, 439-440 (1984). Under the facts of this case, *Miranda* has no applicability and should not be a consideration by this court. In *Miranda*, the Court

extended the protections against self-incrimination to custodial interrogation by the police. 384 U.S. at 460-461, 467. However, this Court has also recognized that the requirements of *Miranda* only apply when a person is placed into custody where there is a formal arrest or restraint of freedom of movement of the degree associated with a formal arrest. *See Oregon v. Mathiason*, 429 U.S. 492, 494-495 (1977).

In the case at bar, there are no facts to suggest that Hiibel was in custody prior to Deputy Dove's request that he identify himself. As long as the investigative encounter does not rise to the level of a formal arrest, a *Miranda* warning prior to asking a lawfully detained suspect to identify himself is not required. Furthermore, it is difficult to imagine that asking "what is your name" is a question that is reasonably likely to elicit an incriminating response from the suspect. *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

D. Stating your name is not the same as stating facts about a crime.

This Court explained the purpose and policies behind the privilege against self-incrimination in *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964), as quoted in *Doe v. United States*, 487 U.S. 201, 212-213 (1988):

> our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and

> abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' . . . ; our respect for the inviolability of the human personality and of the right of each individual 'to private enclave where he may lead a private life,' . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often a 'protection to the innocent.'

Id. at 212-213.

These policies are served when the privilege against self-incrimination is asserted to prevent the suspect from having to reveal his knowledge of facts relating him to a crime or compelling him to share his thoughts and beliefs with the government. *See Doe v. United States*, 487 U.S. 201, 213 (1988). Requiring a person, lawfully detained on reasonable suspicion, to identify himself does not violate these principles and policies of the privilege against self-incrimination. It does not lead a person to reveal knowledge of incriminating facts. The balance between state and individual is carefully crafted by the requirement that the person must be lawfully detained and is only required to provide his name. As a result, NRS 171.123(3) does not violate the privilege against self-incrimination and should be deemed constitutionally valid.

Interestingly, when addressing the Fifth Amendment, Hiibel cites to Justice White's concurring opinion in *Terry v. Ohio*, 392 U.S. 1 (1968), to support his argument that a lawfully detained person cannot be compelled to identify

himself. (Hiibel's Brief p. 15). This Court's opinion in *Adams v. Williams*, 407 U.S. 143 (1972), sheds some light on what Justice White may have meant when he stated in *Terry* that "it seems to me the person may be briefly detained against his will *while pertinent questions* are directed to him. Of course the person stopped is not obligated to answer, answers may not be compelled and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. . . ." *Id.* at 34-35 (emphasis added).

Justice White was part of the majority in *Adams* and made no comment nor refuted the statement that one of the purposes of *Terry* was to determine the detained person's identity. This omission seems to imply that when Justice White used the term "pertinent questions" he was more concerned about compelling a detained person to answer questions relating directly to a crime being investigated and not questions such as "what is your name?" This interpretation is supported by a footnote from the majority's opinion in *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969), and also referenced in Hiibel's brief. (Hiibel's Brief p. 14-15). *Davis* was decided a year after *Terry* and in it the Court reiterated its position regarding compelling an individual to answer questions during the course of an investigation. In footnote six (6) the majority made it clear that "police have the right to request citizens to answer voluntarily *questions concerning unsolved crimes* they have no right to compel them to answer." 394 U.S. at 727 n.6 (emphasis added).

Asking a person "what is your name?" does not fall within the meaning of "questions concerning unsolved crimes." It is a generic question that is substantially different from a question relating to a particular crime.

Respondent asserts that when reading Justice White's concurring opinion in *Terry* in context with this court's statements in *Adams* and *Davis*, it does not appear that he would find compelling a person to identify himself during an investigative detention to be a violation of the Fifth Amendment.

Hiibel also cites Justice Brennan's dissenting opinion in *Michigan v. DeFillippo*, 443 U.S. 31, 44 (1979), as support for his assertion that Deputy Dove violated his right against self-incrimination. (Hiibel's Brief p. 15). Hiibel's reference actually clarifies and supports the State's position on these issues. The most pertinent part of Justice Brennan's dissenting opinion states "while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Id.* at 44-45.

Deputy Dove's request for identification did not constitute a question concerning the battery, DUI or any other unsolved crime. The request for identification did not ask whether Hiibel was driving the truck while under the influence of alcohol or whether he struck the woman sitting inside the truck. Hiibel has failed to demonstrate that the request for identification constitutes a violation against his right of self-incrimination. The cases cited by both Hiibel and the State support one conclusion, requiring a lawfully detained person to identify himself is not a violation of the Fifth Amendment privilege against self-incrimination.

CONCLUSION

In light of the arguments presented herein, this Court should affirm the decision of the Nevada Supreme Court and find that the requirements of NRS 171.123(3) do not violate the Fourth and Fifth Amendments to the United States Constitution.

Respectfully submitted,

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